UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR *et al.*,	:	
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Plaintiffs	:	
	:	
VS.	:	C.A. NO.: 1:04-CV-312-L
	:	
JEFFREY DERDERIAN *et al.*,	:	
	:	
Defendants	:	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS GENERAL FOAM CORPORATION, GFC FOAM, LLC, PMC INC., PMC GLOBAL, INC., FOAMEX INTERNATIONAL, INC., FOAMEX L.P. AND FMXI, INC.'S RULE 12(B)(6) MOTION TO DISMISS

Plaintiffs' response to the Motion to Dismiss of Defendants General Foam Corporation, GFC Foam, LLC, PMC Inc., PMC Global, Inc., Foamex International, Inc., Foamex L.P. and FMXI, Inc. (collectively, "GFC")[1], consists of a series of extravagant conclusions unsupported by either the law or the record. Plaintiffs ask the Court to accept their bald allegations that (1) The Station fire was foreseeable to GFC, (2) GFC must police every use and misuse of thousands of foam end-products, (3) GFC's warnings are inadequate, (4) there is no legal distinction between a bun of bulk foam and an end-product fabricated from bulk foam, and (5) bulk polyurethane foam is defective. These conclusory and unfounded assertions are insufficient to defeat GFC's motion.

I. A Bulk Manufacturer of Polyurethane Foam in Buns has no Duty to Plaintiffs Injured in the Nightclub Fire.

Plaintiffs' contention that GFC owed a duty to Plaintiffs is based on three illusory assertions of law and fact. First, Plaintiffs essentially claim that because foam is known to be flammable, any fire involving foam in any end-product application is foreseeable to GFC as a matter of law. Second, Plaintiffs claim GFC has a duty to practice "product stewardship" whereby GFC must

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[1] Defendants are responding collectively as "GFC" for purposes of convenience regarding this Motion only and without waiver of any of their respective, individual defenses.

190

"follow" its bulk foam to ensure that it is never misused or misapplied by any customer or any customer's customer. Third, Plaintiffs inexplicably argue that GFC did not warn about the flammability characteristics of its foam. As discussed more fully below, Plaintiffs offer no law or evidence to support these assertions.

Plaintiffs advance an expansive view of foreseeability that is unsupported in case law and truly renders the concept meaningless. Plaintiffs' argument boils down to this: the natural and probable consequences of selling bulk foam to a fabricator who makes decorative packaging products is that the remanufactured foam will be misappropriated for an unintended and illegal use in a place of public assembly, undetected by poorly trained fire inspectors, and under circumstances where it will be exposed to ignition sources and thereby endanger many people. Plaintiffs repeat over and over that the misuse of the foam and all of the subsequent circumstances were "reasonably foreseeable"; but merely asserting their conclusion does not substantiate their claim.

Plaintiffs further claim that GFC has an obligation to provide "product stewardship" with respect to its polyurethane foam. Plaintiffs cite no law to support this assertion, but instead cite to the affidavit of one of their experts, David Demers. Mr. Demers claims that the practice of product stewardship "follows the use of raw materials, intermediate products and final goods through the design, manufacture, marketing, distribution, use and disposal to insure proper application and use in order to protect the public." (Demers Aff. ¶19). In other words, Mr. Demers contends that GFC must police every use of polyurethane foam by every GFC customer and all successive customers and end users in the chain of production and sale through the ultimate end-product. Not only is there no support in the law for Plaintiffs' product stewardship claim, such a duty has been expressly

rejected by the bulk supplier doctrine contained in the Restatement (Third) of Torts, Section 5, which has been adopted by the Rhode Island Supreme Court. (See discussion *infra* at pp. 6-9).[2]

Finally, Plaintiffs repeatedly charge that GFC provided no warnings or inadequate warnings regarding the flammability characteristics of its foam. Given the extraordinary and unforeseeable intervening acts in this case, GFC's motion does not depend on whether it provided such warnings. Nonetheless, GFC *did* warn and, inexplicably, not once do Plaintiffs address or acknowledge the clear and very explicit warnings that GFC provided in the sales documentation accompanying its bulk foam and in its material safety data sheets.[3] Plaintiffs and their experts make broad conclusory statements about the lack or inadequacy of GFC's warnings without explaining how they are deficient – perhaps for the obvious reason that to dwell on those warnings would belie the claim they are making.

Instead, Plaintiffs rely heavily on *Remy v. Michael D's Carpet Outlets,* 571 A.2d 446 (Pa. 1990), in which GFC was a defendant. In *Remy*, the product at issue was an end-product – polyurethane foam carpet padding being used in an intended manner – not bulk foam in buns. The padding had been stacked to the ceiling in a storage area of Michael D's carpet store, and ignited from either an electrical failure or by coming into contact with a light bulb. A jury determined that the carpet padding manufacturer, GFC, was 20% at fault for failing to warn *its customer* of the padding's capacity for rapid burn after ignition, and regarding proper storage methods. Plaintiffs

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[2] Plaintiffs take extreme liberties when citing *DiPalma v. Westinghouse Electric Co.,* 938 F.2d 1463 (1st Cir. 1991). They cite it for the assertion that a manufacturer "must exercise foresight as to the various *uses and applications* its product may encounter and the *dangers accompanying such uses and applications* and warn about them." (Plaintiffs' Opposition, p. 13) (emphasis added). In fact the case states only that a manufacture must exercise foresight to "discover a danger in his product and to warn users and consumers of that danger." *DiPalma* at 1467. The product at issue in that case was an escalator; there was no uncertainty as to either the use or the users of that product. The case did not in any way support a duty of "product stewardship" through final product and end user on the part of a raw material manufacturer.

[3] The warnings, which are set forth in the Affidavit of Margaret Hebner attached to GFC's opening memorandum, specifically address the risk of exposure to various ignition sources, the rapid burn rate and the emission of hazardous burn byproducts.

here argue that the state of GFC's warnings were exactly the same in 2000 when it sold bulk foam to American Foam as they were at the time of the *Remy* case. (Plaintiffs' Opposition, p. 12). Plaintiffs blatantly ignore the fact that the warnings provided to American Foam *do* contain the statements that did not appear fifteen years earlier when the events occurred that led to the *Remy* lawsuit.[4] And more importantly for purposes of GFC's motion, in *Remy* there were no independent intervening acts by others for the court to consider and no remote bulk supplier issues. Thus, that decision regarding an *intended* use of carpet padding *by a direct customer* adds nothing to the analysis of whether GFC's manufacture and sale of bulk foam buns to fabricators creates a duty in GFC to anticipate, warn against, and police the ultimate end uses and applications of the foam.

II. The Intervening Acts Severed any Causal Link Between GFC's Alleged Negligence and Plaintiffs' Injuries.

The same three misapprehensions underlying Plaintiffs' duty claim also drive their contention that GFC's manufacture of bulk polyurethane foam proximately caused Plaintiffs' injuries. In addition, Plaintiffs' argument that reasonable foreseeability requires a specific, fact-intensive review is misplaced. For purposes of this motion, Plaintiffs are receiving every benefit of their well-pleaded factual allegations in place of having to present real evidence to support their claims. It is these factual allegations, taken in the light most favorable to Plaintiffs, that are insufficient as a matter of law to establish that GFC's remote manufacture of bulk polyurethane foam proximately caused Plaintiffs' injuries from The Station fire.

Plaintiffs make no adequate attempt to address the multitude of decisions from Rhode Island courts in which intervening acts have been found to sever the causal connection between a defendant's alleged remote negligence and a plaintiff's injuries. They discuss only *Travelers*

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[4] GFC's warnings are clear and unequivocal about the risks of fire when polyurethane foam is improperly handled or exposed to common ignition sources such as welding sparks, naked lights or cigarettes.

Insurance Co. v. Priority Business Forms, Inc., 11 F. Supp.2d 194 (D.R.I. 1998), and attempt to distinguish it solely with the self-serving conclusion that GFC's manufacture of bulk non-fire retardant foam, suitable for thousands of safe and proper uses, created an "extraordinarily high level of danger" unlike the *Travelers* defendant's storage of flammable chemicals and paper in close proximity.

Rather than address the Rhode Island decisions supporting GFC, Plaintiffs instead cite to distinguishable cases from other jurisdictions in which the defendant's alleged negligence is closely related to the plaintiff's injury. For example, *Bigbee v. Pacific Telephone & Telegraph Company*, 665 P.2d 947 (Cal. 1983), addressed whether defendants who situated a telephone booth 15 feet from a major thoroughfare and commercial driveway, in the same location where another booth had been struck before, could have foreseen that a speeding car would leave the roadway and run into the booth, injuring the plaintiff inside. *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666 (N.Y. Ct. App. 1980) addressed whether a contracting company who set up an excavation site on a roadway could have foreseen that a car driven by a man having an epileptic seizure would leave the roadway and run into the plaintiff working at the site.

Independent School District No. 14 v. AMPRO Corp., 361 N.W.2d 138 (Minn. Ct. App. 1985), is also distinguishable. *AMPRO* involved polyurethane foam gym mats being used in an anticipated and intended manner. A fire, started by high school students, ignited the gym mats. The court concluded that the harm did not result from an unanticipated use of the gym mats, since storing them in a school was a normal practice, and that a jury could have concluded that the risk of vandalism by high school students was foreseeable. *Id.* at 142-44.

None of these non-Rhode Island cases involved conduct or products nearly so remote from the injury-causing event – in space, time or intervening conduct – as the production of bulk foam in this case.

III. GFC's Remote Manufacture of Bulk Polyurethane Foam is Encompassed by the Bulk Supplier Doctrine.

Plaintiffs claim that GFC is not a bulk supplier within the meaning of Section 5 of the Restatement (Third) of Torts because the bulk foam supplied by GFC was not "integrated into an end product." (Plaintiff's Opposition at p. 28). Plaintiffs claim "[t]here is no such product other than the foam itself." (*Id.*) Plaintiffs' argument fails for several reasons.

First, Section 5 of the Restatement (Third) expressly includes raw materials and bulk products within the definition of product components, and in fact provides an illustration applying the doctrine to a manufacturer of bulk foam that is fabricated into disposable dishware. Restatement (Third) of Torts: Products Liability, §5, comment b, illustration 4. There is no suggestion that the end product in the illustration -- disposable dishware -- consists of anything other than bulk foam that has been cut into appropriate sizes and shapes for use as dishware. (*Id.*) Clearly the doctrine is intended to apply to bulk foam that has been cut and processed into an entirely different foam end product.

Second, Plaintiffs offer no authority for their contention that Section 5 of the Restatement (Third) creates a more stringent standard for the bulk supplier doctrine than existed under prior law. Nowhere do the comments or Reporter's Notes to Section 5 suggest a departure from the doctrine developed under case law; rather, the comments and illustrations repeatedly cite to existing case law as the source for the doctrine and its rationale. Moreover, the *only* case Plaintiffs cite on this issue actually contradicts their argument. The court in *In re: Silicone Gel Breast Implant Product Liability Litigation,* 996 F. Supp. 1110 (N.D. Ala. 1996), noted that "[t]he expected development of the bulk/raw materials supplier doctrine, as presaged in the 1965 Restatement (Second), has been

recognized in the Proposed Final Draft of the Restatement of the Law of Torts: Products Liability (Third)...." *Id.* at 1114.[5]

Third, Plaintiffs' Complaint specifically alleges that the bulk foam in this case was indeed incorporated as a component into the interior finish of The Station nightclub. In its allegations against Defendant Jeffrey Derderian, the Complaint states "[Derderian] installed and maintained defective material, including flammable foam and other interior finish, in The Station which caused and contributed to fire spread...." (Complaint, ¶274b). Thus the end product which allegedly caused harm was not stand-alone fabricated foam, but the interior of the nightclub which, according to Plaintiffs, incorporated foam and "other interior finish" materials.

Lastly, Plaintiffs' interpretation of the bulk supplier doctrine negates its stated rationale, *i.e.* that a supplier of a bulk or raw material having a broad range of uses and functions should not be burdened with scrutinizing the safety profile of every product and industry which uses that material. *See, e.g., In re TMJ Implants Prods. Liab. Litig.*, 872 F. Supp. 1019, 1025 (D. Minn. 1995) ("Dupont merely supplied products that have multiple industrial uses. To impose liability upon Dupont for the uses to which those products are put would force Dupont to retain experts in a huge variety of areas in order to determine the possible risks associated with each potential use.") *See also Hoffman v. Houghton Chemical Corp.*, 751 N.E.2d 848, 856-57 (Mass. 2001).

Polyurethane foam is one of the world's most versatile and ubiquitous products. It is found in furniture, automobiles, shoes, athletic equipment, toys, cleaning supplies, hospital equipment,

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[5] Plaintiffs imply that the MDL court's decision to grant summary judgment for GE under the raw material supplier doctrine in *In re Silicone Gel Breast Implants,* turned on the fact that GE's raw silicone product underwent "substantial changes" before it was incorporated into breast implants. (Plaintiffs' Opposition at p. 28). In fact, that was only one of several factors that the court examined and weighed. 996 F. Supp. at 1114-1117. Moreover, Plaintiffs fail to acknowledge an opinion from that same MDL court (cited in GFC's opening brief herein) which granted summary judgment for the manufacturer of bulk polyurethane foam which had been used by implant manufacturers as a covering on certain breast implants. The court stated "Whether this foam can be considered as being in substantially the same condition when implanted as when sold by Scotfoam is highly doubtful, *though not critical to the court's granting summary judgment in favor of Scotfoam.*" *In re: Silicone Gel Breast Implant Product Liability Litigation,* 887 F. Supp. 1463, 1466 (N.D. Ala. 1995) (emphasis added).

and hundreds of industrial applications. Many products and applications consist of, as Plaintiff characterizes it, cutting large foam buns into smaller shapes. Cosmetic applicators, sponges, decubitous ulcer pads, bandage wraps, lint-free wipes, and infant heart valve patches are all separate and unique products made entirely of bulk foam.[6] When researchers invented an implantable infant heart valve patch made from a tiny piece of polyurethane foam, Plaintiff apparently contends that bulk foam producers were responsible for overseeing the development and testing of that product. Plaintiff would similarly insist that a two-inch foam cosmetic pad is the same "product" as a 7 x 4 x 3-foot bun of bulk foam, and therefore GFC should be charged with policing the cosmetic pad company's testing and use of foam for that purpose.

Plaintiffs state repeatedly in their memorandum that GFC should be charged with "product stewardship" and "follow[] the use of raw materials, intermediate products and final goods through the design, manufacture, marketing, distribution, use and disposal to insure proper application and use in order to protect the public." (Plaintiffs' Opposition at p. 14). This is not the law and Plaintiffs cite no authority whatsoever to suggest that it is. Nor do they acknowledge to the Court that the Restatement's stated rationale behind the bulk supplier doctrine expressly rejects imposing such a burden on a bulk or raw material supplier. "To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control. Courts uniformly refuse to impose such an onerous burden." Restatement (Third) of Torts §5, comment c.

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[6] *See also In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1463 (D. Ala. 1995). There, one of a bulk foam manufacturer's customers was a fabricator that would cut buns of foam into thin sheets and then sell these "clean wipes" to a variety of companies in the computer, electronics, aerospace, and medical industries. Breast implant manufacturers purchased clean wipes from the fabricator and attached them to an implant. The court held that, under the bulk supplier doctrine, the bulk foam manufacturer had no liability to the implant recipients for failing to warn that foam could release carcinogens in this application.

As discussed in GFC's opening brief (and conceded by Plaintiffs), the Rhode Island Supreme Court has expressly adopted the bulk supplier doctrine of Section 5 of the Restatement (Third) of Torts.

Plaintiffs next argue that, even if GFC is a bulk supplier under § 5 of the Restatement, the bulk foam is "defective" and "this defect was delivered intact from General Foam to American Foam to the owners of the Station nightclub." (Plaintiff's Opposition, p. 30). Plaintiffs' blanket assertion that bulk foam is defective is, in fact, belied by the assertions of their own expert. Plaintiff's expert, Gordon Damant, acknowledges that polyurethane foam is "a pervasive product in our society" and is "used in many and varied applications and occupancies." (Damant Aff. ¶ 25). He further states that "[w]here and how the foam and end products are to be used dictate the different foam characteristics, including fire performance. Risks vary among various types of occupancies and even within certain occupancies." (*Id.* at ¶ 24). Plaintiffs and their experts do not and cannot allege that non-fire retardant bulk foam is defective when, for example, used to produce an application such as a blood filter, in which fire retardant additives are neither necessary nor desirable. As the MDL court in the Breast Implant Litigation held, "Notwithstanding plaintiffs' evidence that degraded foam may release a chemical that has been associated with cancer in animals [footnote omitted], bulk foam with its broad array of apparently safe uses, should not be viewed as an inherently dangerous product." *In re: Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1463, 1467 (N.D. Ala. 1995).

Plaintiffs clearly contend that the *application* of the foam in The Station night club, and *not* the bulk foam commodity itself, was defective and unreasonably dangerous. And they further contend that it was the *use* of the foam as soundproofing in an *application* where fire hazards existed, that rendered the foam defective and unreasonably dangerous. As reflected in the Affidavit of Margaret Hebner, attached to GFC's Opening Memorandum, GFC provided express warnings regarding the flammability of foam at the point of sale. And, as alleged in Plaintiff's Complaint,

American Foam's salesman Barry Warner was aware of the alleged "dangerous characteristics" of the foam. (Complaint, ¶462). Simply stated, GFC, as a bulk supplier, is not liable for the improper and illegal use of polyurethane foam on the interior of The Station.

IV. Plaintiffs' Affidavits are Not Proper Evidence to Rebut GFC's Motion and Should be Disregarded.

Plaintiffs offer three expert affidavits in opposition to GFC's motion. These affidavits merely regurgitate the legal conclusions advanced by Plaintiffs that every intervening act that occurred between GFC's manufacture of bulk foam and Plaintiffs' injuries was foreseeable to GFC, and that GFC had a legal duty to exercise "stewardship" over its bulk foam material.

Expert opinions that merely offer conclusory assertions about ultimate legal issues cannot overcome GFC's motion. *Hayes v. Douglas Dynamics*, 8 F.3d 88, 92 (1st Cir. 1993); *Bowen v. Manchester*, 966 F.2d 13, n.16 (1st Cir. 1992); *Moody v. Boston and Maine Corp.*, 921 F.2d 1, 5 (1st Cir. 1990). "Where an expert presents 'nothing but conclusions – no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected', such testimony will be insufficient to defeat a motion for summary judgment." *Hayes*, 8 F.3d at 92 (quoting *Mid-State Fertilizer v. Exchange Natl. Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989)).

The experts' statements relied upon by Plaintiffs yield nothing but unsupported opinions and conclusions, hearsay and misrepresentations of fact. Such evidence is wholly insufficient to defeat GFC's motion, and the Court should disregard the affidavits.

Conclusion

For the reasons set forth in GFC's Opening Memorandum and this Reply, GFC requests that the Court dismiss, with prejudice, all of Plaintiffs' claims against GFC.

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I hereby certify that on the 5th day of November, 2004, a true copy of the within was mailed to:

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